91-565

No. _____

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In The

Supreme Court of the United States

October Term, 1991

JAMES T. ADAMS,
Petitioner,

v.

CITY OF DETROIT, MICHIGAN,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

TERRI L. HAYLES (P-33276)
Supervising Assistant Corporation Counsel
Counsel of Record
1010 City-County Building
Detroit, Michigan 48226
(313) 224-4550, Ext. 233

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE VETERANS PREFERENCE ACT DOES NOT REQUIRE THE PETITIONER RECEIVE A FULL HEARING PRIOR TO DISCIPLINARY ACTION.

II.

WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE PREDISCIPLINARY PROCEEDINGS AT WHICH IT WAS DECIDED TO SUSPEND THE PETITIONER FULLY COMPORTED WITH THE REQUIREMENTS OF THIS COURT'S DECISION IN *CLEVELAND BOARD OF EDUCATION v LOUDERMILL*.

PARTIES

Petitioner James T. Adams was the Plaintiff-Appellant in the courts below. Respondents City of Detroit, Coleman A. Young, Mayor of the City of Detroit, City of Detroit Fire Department, Melvin Jefferson, Fire Commissioner, and Phillip F. Gorak, Deput, Fire Commissioner were the Defendants-Appellees in the courts below.

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

COUNTER-STATEMENT OF THE CASE 3

CURRENT STATUS OF CASE 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT:

I. THE PETITIONER HAS NO STATUTORY RIGHT TO A PREDISCIPLINARY HEARING. THEREFORE, THERE CAN BE NO CONSTITUTIONAL RIGHT TO SUCH A HEARING. 8

II. THE TRIAL COURT CORRECTLY HELD THAT THE DISCIPLINARY PROCEDURES UNDER WHICH PETITIONER WAS SUSPENDED AND ULTIMATELY DISCHARGED, FULLY COMPORTED WITH THE REQUIREMENTS OF *CLEVELAND BOARD OF EDUCATION v LOUDERMILL*. 11

CONCLUSION 14

TABLE OF AUTHORITIES

PAGE

CASES:

Arnett v *Kennedy*, 416 U.S. 134 (1973) 9

Bishop v *Wood*, 426 U.S. 341 (1976) 9

Board of Regents v *Roth*, 408 U.S. 564 (1972) 8

Cleveland Board of Education v *Loudermill*, 470 U.S. 532 (1985) 11, 12

Duchesne v *Williams*, 849 F2d 1004 (6th Cir. 1988) 12, 13

Garraghty v *Jorden*, 830 F2d 1295 (4th Cir. 1987) 12, 13

Glover v *Kalamazoo*, 98 Mich. App. 465, 296 N.W.2d 280 (1980) 10

Valentine v *McDonald*, 371 Mich. 138, 123 N.W.2d 227 (1963) 9-10

CONSTITUTIONAL PROVISION:

U.S. Const. Amend. XIV, § 1 2

STATUTES:

28 U.S.C. § 1257 3

42 U.S.C. § 1983 ..... 3, 6

Michigan Veteran's Preference Act 35.402 ..... 2, 6, 8

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OPINIONS BELOW

On April 15, 1988, Judge Susan D. Borman, Wayne County Circuit Court, entered an order granting Defendant's Motion for Summary Disposition in a Mandamus Action brought by Petitioner.

On January 30, 1989, Judge Susan D. Borman, Wayne County Circuit Court, entered an order denying Writ of Superintending Control.

On April 10, 1990, Judges Robert J. Danhof, Thomas J. Brennan and Glenn S. Allen, Jr., State of Michigan Court of Appeals, issued an opinion affirming the above two actions.

On February 25, 1991, the Michigan Supreme Court denied the Petitioner's Application for Leave to Appeal.

JURISDICTION

The judgment of the State of Michigan Court of Appeals was entered on April 10, 1990. A timely petition

for leave to appeal to the Michigan Supreme Court was denied February 25, 1991. The Petitioner's request with this Court was filed within 90 days of that date. Respondent files the present brief in opposition within 30 days after receipt of petition. The jurisdiction of the Supreme Court has been invoked pursuant to Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution states as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Veteran's Preference for Public Employment 35.402 states, in pertinent part, as follows:

> No veteran . . . holding an office or employment in any public departmental . . . shall be removed or suspended . . . except after a full hearing before . . . the mayor of any city . . . [p]rovided, however, that where such veteran has been removed . . . other than in accordance with the provisions of this act, he shall file a written protest . . . within 30 days from the day such veteran is removed . . . otherwise the veteran shall be deemed to have waived the benefits and privileges of this act . . .

28 U.S.C. § 1257 State courts; certiorari:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

42 U.S.C. § 1983 Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

COUNTER-STATEMENT OF THE CASE

Petitioner Adams was employed under the jurisdiction of the Detroit Fire Department as Civil Defense Coordinator

until his discharge effective February 19, 1982. On January 22, 1982, an employee of the Fire Department filed a Complaint of threats and verbal abuse against Petitioner Adams. A meeting to discuss the matter was called by the Deputy Fire Commissioner, Phil Gorak, on February 10, 1982. After this meeting and further investigation and review by Mr. Gorak, he suspended Mr. Adams for 15 days. All attempts to serve Mr. Adams with notice of the suspension either by registered mail or personally were to no avail since Mr. Adams refused to accept it.

Several days later on February 18, 1982, Mr. Gorak spoke with Mr. Adams and informed him if he failed to vacate his office, he was liable for discharge. Mr. Adams still did not comply. The Department then decided to discharge Mr. Adams. Again, attempts to serve Mr. Adams by registered mail and telegrams failed because Mr. Adams refused to accept.

Finally, on February 23, 1982, an Administrative Assistant along with two police officers personally served the notice and explanatory letter on Mr. Adams. On March 4, 1982, Mr. Adams filed a request for a VPA hearing, received by the Mayor's office on March 5. At the same time, Mr. Adams filed a Civil Service grievance with the City's Personnel Department. A third step meeting regarding the grievance was scheduled for March 15, 1982. On that date, the Fire Department and the Personnel Department were contacted by telephone by attorney Kenneth V. Cockrel, who indicated that he would be representing Mr. Adams and requested re-scheduling of the third step hearing.

The third step hearing was held on March 24, 1982. Present were Mr. Adams, his attorney Mr. Cockrel, Fire Marshal Donald Robinson, Fire Department Administrative Assistant Quinton Watkins, City of Detroit attorney Kenneth King, and representing the Personnel Department,

Michael Jozwik. Mr. Cockrel and Mr. Adams contended that the bases for the suspension and discharge were legally insufficient and factually inexplicit. They were advised that the discharge was for insubordination and provided with records pertaining to the events leading to the discharge. It was also indicated that a full explication of the grounds for the disciplinary actions would be provided to Mr. Adams following the meeting.

A third step response was mailed to Mr. Adams and Mr. Cockrel on April 1, 1982 by Fire Commissioner Melvin Jefferson, Mr. Adams' ultimate superior, detailing in a five-page account the particulars supporting the Department's decision to suspend and discharge Mr. Adams.

In response, attorney Cockrel requested a full civil service hearing on Mr. Adams' grievance by way of letter dated April 2, 1982. In his letter, Mr. Cockrel also requested information regarding Mr. Adams' application for a VPA hearing. Michael Jozwik responded by letter dated April 15, 1982, scheduling a pre-hearing conference for April 22, 1982 and referring the VPA question to the City's attorney, Kenneth King.

In attendance at the pre-hearing conference were Mr. Cockrel, Mr. Adams, Mr. Jozwik, Mr. King and Kay Schloff, who had been designated to act as hearing officer in Mr. Adams' VPA hearing. Mr. Cockrel, on behalf of Mr. Adams, requested that the Civil Service hearing and the VPA hearing be either combined, or taken in serial order, with the transcripts from whichever hearing came first to be used in lieu of repeating all testimony at the hearing to be scheduled second. Although no final decision was made on this request at the pre-hearing conference, Mr. Cockrel's suggestion was ultimately taken up by the City. At Mr. Adams' request, the Civil Service hearing was held first.

The Civil Service hearings were held before mutually-selected arbitrator Stanley H. Brahms on June 24 and 28, 1982, which were reduced to some 600 pages of transcript encompassing the testimony of some ten witnesses and numerous exhibits. The City's case was consistent with the specification set forth in its step three answer. Arbitrator Brahms rendered his opinion upholding the discharge on August 6, 1982.

The VPA hearings were held before hearings officer Kay Schloff on August 25 and September 13, 1983. By agreement of the parties, the transcripts of the prior Civil Service hearings were entered in lieu of actual testimony, although Mr. Cockrel did call and interrogate two witnesses who had testified at the Civil Service hearings. Hearing Officer Schloff transmitted her findings to the Mayor's office on April 17, 1984. The Mayor sustained the discharge and informed Mr. Adams by way of letter dated November 8, 1985.

CURRENT STATUS OF CASE

On July 25, 1986, Petitioner Adams filed a Complaint for writ of mandamus in the Wayne Circuit Court alleging violation of his due process and equal protection rights under 42 U.S.C. § 1983. In addition, Petitioner claimed that the City had violated the provision of the Veteran's Preference Act; MCL 35.402; MSA 4.1222.

The trial court granted Petitioner's motion for summary disposition and dismissed the Complaint for mandamus. Petitioner appealed by delayed application for leave to the Court of Appeals, Docket No. 110121.

On February 10, 1988, Appellant filed a Complaint for Superintending Control in the Wayne County Circuit Court. On January 13, 1988, the Court granted Defendant-

Appellee's motion for summary disposition. Petitioner appealed by right to the Court of Appeals, Docket No. 115093.

The two were consolidated by order of the Court of Appeals. The matters were fully briefed and argued. The Court of Appeals issued a decision on April 10, 1990, *James T. Adams* v *City of Detroit, Detroit Fire Department, and Mayor of Detroit*, 184 Mich. App. 589, 458 N.W.2d 903 (1990).

In its decision, the Court of Appeals affirmed both of the lower court's decisions granting summary disposition to Respondent. Re-hearing was denied on June 8, 1990.

On February 25, 1991, the Michigan Supreme Court denied Petitioner's application for leave to appeal. Petitioner now requests this Honorable Court grant Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The trial court correctly ruled that the Petitioner has no right under the VPA to a predisciplinary hearing. The VPA provides that where a hearing is not held prior to imposition of discipline, the employee may request a hearing within thirty days of the date of the employer's action. Since there is no statutory right to a predisciplinary hearing, there can be no constitutional right to such a hearing.

The trial court correctly determined that the procedures under which the Petitioner was suspended and ultimately discharged fully comported with the requirements of the Due Process clause. The Petitioner was informed of the charges against him and given the opportunity to respond before discipline was imposed. Any insufficiency in the notice given to the Petitioner was caused by his refusal to

accept it. Therefore, there is no error in the proceedings below and the Petitioner's request for a Writ of Certiorari should be denied.

ARGUMENT

I.

THE PETITIONER HAS NO STATUTORY RIGHT TO A PREDISCIPLINARY HEARING. THEREFORE, THERE CAN BE NO CONSTITUTIONAL RIGHT TO SUCH A HEARING.

The Petitioner contends that the Michigan Veteran's Preference Act (VPA) entitles him to a hearing prior to suspension or discharge. The VPA as amended in 1931 (1931 PA 67) provides for either a hearing prior to discipline, or a hearing after the imposition of discipline. Where an employee does not receive a hearing prior to discipline, the VPA provides that he shall:

> file a written protest with the offices whose duty under the provisions of this act it is to make the removal . . . within 30 days from the day such veteran is removed . . . otherwise the veteran shall be deemed to have waived the benefits and privileges of this act.

§ 35.402 Mich. Comp. Laws Ann. (West, 1984).

The VPA clearly contemplates that an employer may impose discipline prior to a hearing. In addition, the act specifically enumerates a procedure by which the employee may request a hearing after discipline has been imposed. It therefore follows that the VPA does not grant the Petitioner an absolute right to a prediciplinary hearing.

This Court has determined that a property interest in employment is not created by the Constitution. *Board of Regents* v *Roth*, 408 U.S. 564, 577 (1972). Whether such an

interest has been created by a state statute must be determined by reference to state law. *Bishop* v *Wood*, 426 U.S. 341, 344 (1976). Where a property interest in employment is granted by a legislature subject to procedural limitations, the employee cannot assert a right broader than the grant as limited. *Arnett* v *Kennedy*, 416 U.S. 134, 153-54 (1973).

The Petitioner's assertion that the VPA grants an absolute right to a prediciplinary hearing rests entirely on a sixty-year-old Attorney General Opinion. The Court below correctly determined that the Michigan Supreme Court rejected that opinion in *Valentine* v *McDonald*, 371 Mich. 138, 147; 123 N.W.2d 227, 231 (1963).

In *Valentine*, the plaintiff was removed from his position for immoral conduct. The Civil Service Commission upheld the discharge. However, a hearing before the Township Board was never held as requested by the plaintiff and required by the VPA. The plaintiff requested that the Township Board reinstate him on the ground that the VPA hearing had not been held within thirty days of his request. The Board denied the request and the Circuit Court dismissed his complaint. On appeal in the Michigan Supreme Court, the court rejected the defendant's claim that the Civil Service Statute repealed the VPA. The court also rejected the plaintiff's claim that he was entitled to reinstatement until a VPA hearing was held. The court held that:

> While the Veteran's Preference Act does provide that the Township Board shall hold a hearing within thirty days after the veteran employee files a protest of his discharge, it does not provide that failing that the employee is automatically reinstated to this position. The hearing must precede such reinstatement. He has not had the hearing before the Township Board. He is entitled to it. His right

> to reinstatement is dependent on the decision of that Board.

Id. at 147, 231.

In *Glover* v *Kalamazoo*, 98 Mich. App. 465, 296 N.W.2d 280 (1980), plaintiff, a police officer, was suspended indefinitely pending criminal charges. The charges were later dropped on a technicality. The Chief of Police later terminated the officer for official misconduct for giving false testimony. At a hearing held pursuant to the VPA, the Mayor upheld the discharge. Plaintiff appealed to circuit court which held that the plaintiff was wrongfully discharged because he was not given a VPA hearing prior to his original suspension during his pending criminal case.

On appeal, the defendant asserted that the plaintiff waived his right to the hearing by not filing a protest within the thirty-day limit. The court held that the protest was filed within the limit. In addition, the court held that the trial court erred:

> [W]hen it found a violation of the hearing requirement of the veterans preference act. Plaintiff could have, but need not have, demanded a preference hearing at any time during the criminal prosecution. In the absence of such a demand, defendant had no affirmative duty to hold a hearing on the suspension.
>
> We also hold that plaintiff was not deprived of procedural due process as a result of his suspension. It is clear that defendant had an opportunity to be heard on the suspension. Plaintiff could have demanded an earlier hearing if he so desired.

Id. at 469, 296 N.W.2d at 282.

The Petitioner would have this Court confer a broader right than that granted him under Michigan law. It is clear

that the VPA does not grant an absolute right to a predisciplinary hearing. *Valentine* and *Glover*, *supra*, clearly demonstrate that there is no right to remain employed during the pendency of the VPA hearing; it follows that there can be no right to a VPA hearing before the imposition of discipline. Since the Petitioner has no statutory right to a predisciplinary hearing, he cannot have a constitutional right to such a hearing. Therefore, a Writ of Certiorari should not be granted.

II.

THE TRIAL COURT CORRECTLY HELD THAT THE DISCIPLINARY PROCEDURES UNDER WHICH PETITIONER WAS SUSPENDED AND ULTIMATELY DISCHARGED, FULLY COMPORTED WITH THE REQUIREMENTS OF *CLEVELAND BOARD OF EDUCATION* v *LOUDERMILL*.

The Petitioner asserts that his constitutional due process and equal protection rights have been violated because he received insufficient notice that the Respondent was about to take disciplinary action against him. In addition, he contends that since notice was not adequate, he was unable to prepare a defense. The Petitioner's argument rests on a misinterpretation of this Court's decision in *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532 (1985). The Petitioner contends that he was entitled to a hearing at which he would have the opportunity to present an elaborate defense.

In *Loudermill*, *supra*, this Court held that the Due Process Clause requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Id.* at 503-04, quoting *Boddie* v *Connecticut*, 401 U.S. 371, 379, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971). The predisciplinary hearing is "[i]n general, 'something less' than a full evidentiary hearing . . ." *Id.* at 506. It should be "an initial check against mistaken decisions —

essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. *Id.* at 469, 70. The process that is due to an employee under *Loudermill* is "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

In *Garraghty* v *Jorden*, 830 F2d 1295 (4th Cir. 1987), appellee was summoned to a meeting with his superiors. At this meeting appellee was charged with insubordination and requested to explain his conduct. Finding the appellee's explanation insufficient, his superiors suspended him. Appellee claimed that this meeting violated his Due Process rights because he was not informed before or at the beginning of the meeting that charges would be brought against him. The court applied *Loudermill*, determining that under the circumstances, the summons alone provided sufficient notice of the nature of the meeting. *Id.* at 1301. In addition, the court concluded that the discussion of the charge of insubordination and the opportunity provided to appellee to explain himself was sufficient under *Loudermill*. *Id.*.

In *Duchesne* v *Williams*, 849 F2d 1004 (6th Cir. 1981), plaintiff was discharged for improper conduct. A hearing was held at which the plaintiff was permitted to present witnesses. The discharge was upheld. The plaintiff later claimed that the hearing was not impartial and therefore did not satisfy the requirements of the Due Process Clause. The District Court granted plaintiff's request for an injunction "requiring as a matter of federal due process a trial-type predetermination evidentiary hearing before a neutral decisionmaker." *Id.* at 1006.

On appeal, the 6th Circuit reversed. The court held that *Loudermill* only required notice of the charges against the employee and an opportunity to present his side of the

story. *Id.* at 1007. The court determined that the purpose of the pretermination hearing is to:

> "invoke the employer's discretion," his sense of fairness and mutual respect, his willingness to reconsider. It is not designed or well-adapted to uncover the employer's bias or corrupt motivation.

Id. at 1008.

It is the full post-termination hearing that serves this purpose. The pretermination hearing is not meant to resolve the entire dispute, its purpose is to prevent mistakes by encouraging discussion prior to taking disciplinary action.

The record will clearly show that the Petitioner received sufficient notice of the charges against him and an opportunity to respond at the meeting held on February 10, 1982. It is not necessary for the employee to prepare an elaborate defense for such a meeting. The Petitioner was made fully aware of the charges against him and was permitted to respond orally and in writing. This is precisely the procedure required under *Loudermill*. *Garraghty v Jorden*, 830 F2d 1295, 1301 (4th Cir. 1987).

The Petitioner argues that he did not receive sufficient notice of his termination and that the City was required to hold a separate hearing on the issue of termination. The record shows that the Petitioner refused to accept service of notice that he was required to vacate his office. The record shows that the Petitioner was informed orally that he faced discharge if he refused to comply. Any insufficiency of notice is the result of the Petitioner's own actions. The Petitioner is not entitled to a separate pretermination hearing. The Court of Appeals correctly observed that the City could have discharged the Petitioner following the meeting of February 10.

The Petitioner received all the process that was due. He received a prediscipliniary hearing and a hearing after he

was terminated. Any delay in the convening of the VPA is the result of the Petitioner's own request that it be held after the Civil Service Commission hearing. The Petitioner's rights under the Due Process clause have been sufficiently protected under the employer's disciplinary proceedings. Therefore, the Petitioner's request for aWrit of Certiorari should be denied.

CONCLUSION

In light of the facts, arguments and authorities submitted above, as well as the detailed opinion by the Court of Appeals, Respondent requests that this Court deny Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

By: /s/ TERRI L. HAYLES (P-33276)
Supervising Assistant Corporation Counsel
Counsel of Record
1010 City-County Building
Detroit, Michigan 48226
(313) 224-4550, Ext. 233

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